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January 9, 2006

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VIA U.S. MAIL AND E-MAIL

Re: Draft Model Rules Regarding Public Records

Dear Mr. McKenna:

On behalf of The Spokesman-Review newspaper and our firm, we are writing regarding the draft model rule on public records. We appreciate your work in providing Washington citizens and agencies guidelines to fulfill the broad principles of public disclosure embodied by the Washington Public Disclosure Act. Our specific comments are as follows:

1. Section 44-14-03001(2). A statement should be included to clarify that "the conduct of government" includes actions of government officials and employees that relate to the performance of their jobs.

2. Section 44-14-04003. A specific statement should be included that an agency has only three potential responses under the statute (*i.e.*, disclose the record, not disclose the record pursuant to a stated exemption, or withhold the record pending notification to an affected third party to give that party an opportunity to seek injunctive relief). An agency may not respond by initiating litigation against the requesting party seeking a court's determination of whether disclosure is required in lieu of making its own decision as to whether a record is exempt. To allow agencies to whom a request has been made to initiate what in essence would be an interpleader action would require a requester to engage in potentially costly litigation when the requester may not have intended to do so even if the agency had denied the request.

3. Section 44-14-04003(3), (5), (6). A statement should be included to remind agencies that the public records officer's response to the requesting party should be made in writing.

4. Section 44-14-04003(5). The statement that certain requests may take "months or longer" to fulfill invites public records officers to overestimate response times and may result in delay. Given the new provision in the statute for production of records in installments, such language should be stricken in favor of a reiteration of the potential of installment production in response to requests seeking a large number of records.

5. Section 44-14-04003(10). The fourth paragraph suggests that an agency may bring an action against a requesting party. As stated above, language should be included to clarify that an agency to whom a request has been directed may not initiate litigation against a requesting party seeking a court's determination of whether disclosure is required in lieu of making its own decision as to whether a record is exempt.

6. Section 44-14-050. This section invites an agency to deny access to all records contained on a computer disk to the extent it sanctions not providing access to proprietary software programs without suggesting that other public records contained on the same disk must be provided. The language should acknowledge that other records that do not constitute proprietary software programs contained on the same disk must be disclosed. The language should further state that use of specialized software systems (which may be provided by the requesting party if not available to the agency) to retrieve non-proprietary records contained on the same computer disk as proprietary material does not constitute the creation or reformatting of a record.

7. Section 44-14-050(d). The statute does not provide for an agency to limit the number of public records requests that may be made by the public or allow agencies to stop responding to requests after a certain amount of time has been spent. As such, this subsection should be stricken.

8. Section 44-14-050(g). Under the statute, electronic materials or materials contained in disk format can constitute public records. Since a record in disk format is, by definition, a "writing" and, thus, a separate record than its paper counterpart, an agency must provide a disk record in disk format if so requested. Stated simply, a copy of a record kept on a disk is a copy of the disk, not paper copies of what is contained on the disk. The language stating that an agency may choose whether to provide such record in electronic or paper form should thus be stricken.

9. Section 44-14-06002(3). Language should be added that, to the extent an agency attorney provides advice to an agency on purely policy matters, such communication is not subject to the attorney-client privilege. A statement should also be added that clarifies that records created in the course of administrative business of an agency by an agency lawyer do not constitute work product.

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10. Section 44-14-06002(4). Language should be added to clarify that memoranda containing discussion of policy implementation are not exempt from disclosure, while memoranda discussing policy making are exempt from disclosure.

11. Section 44-14-07003. As a "writing" under the statute includes a disk, a paper version of a record that is contained on a disk does not constitute production of the actual record requested. A requester has a right to seek a copy of a disk. As such, the language should reflect that production of a record in a format other than that of the original record must be agreed to by the requesting party.

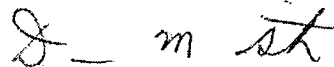
12. Section 44-14-08004 (5)(c). This subsection states that an action "can be initiated by the agency" without clarifying that an agency may initiate an action against a requesting party only when the agency is a party to whom the record "specifically pertains" and is not the agency to whom the request was directed. As stated above, the rules should clarify that an agency may not initiate litigation against a requesting party seeking a court's determination of whether disclosure is required in lieu of making its own decision as to whether a record is exempt.

We appreciate this opportunity to comment on the proposed rules. Please feel free to contact me if you have any questions.

Very Truly Yours,

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

By:

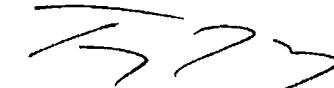


Duane M. Swinton

Very Truly Yours,

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